

SWRCB Public Workshop
Regarding Water Transfers
May 4, 2000

Outline of Comments by Andrew M. Hitchings, De Cuir & Somach

SWRCB's Water Transfers Guide correctly describes general water transfer analysis:

- Origin of Water (Imported or In-Basin Supplies)
- Type of Water (Surface Water or Groundwater)
- Source of Water (Storage Releases/Conserved Water)
- Statutory Framework For Transfer (Urgency/Short-Term/Long-Term)

Intra-Basin vs. Inter-Basin Transfers / Area of Origin Protections / Term 91

- Generally the no-injury rule protects junior water right holders from the expansion of senior water rights that could occur pursuant to a water transfer.
- However, if the transfer occurs wholly within the area of origin, the area of origin protection statutes allow the intra-basin transfer even if it operates to the injury of other legal users of water located outside the area of origin, provided that the transfer involves only natural flows.
- The SWRCB's Guide notes that if Term 91 has been triggered, then the SWP/CVP could suffer an injury not contemplated under the Watershed Protection Statutes, because they may be required to release additional stored water to make up for reservoir refill impacts or reduced return flows resulting from the intra-basin transfers.

- Most people in the Sacramento Valley acknowledge that they can't transfer supplemental stored water released by the SWP/CVP. There is an issue, however, regarding how Term 91 is implemented to supposedly protect supplemental stored water. This is important within the intra-basin water transfer context, because if Term 91 is implemented incorrectly, then certain intra-basin water transfers will be denied their area of origin protections.
- As we understand it, Term 91 has been implemented in a manner that at times would preclude upstream diversions of natural flow, or other quantities of water that would be in the system as natural flow or otherwise subject to appropriation, but for the operations of the export pumps.
- Some modification of Term 91 is necessary before it can be used any further by the export projects as a basis to claim injury from water transfers or from upstream diversions in the areas of origin. Certain Sacramento Valley interests intend to provide the SWRCB with a further analysis of this issue within the next few months, probably as part of the Bay-Delta Water Rights Hearing process.
- Term 91 has been misused in another manner in the transfer context. This has occurred when certain export interests have requested that Term 91 be imposed on certain water transfers, even though the underlying water right is not subject to Term 91. As long as only natural flows are involved in the transfer, Term 91 is simply inapplicable and such attempts to expand its application are inappropriate.

AB 1741

- Assembly Bill 1741 (AB 1741) was introduced by Assembly Member Helen Thomson (D-Davis) and is sponsored by NCWA.
- AB 1741 concerns water transfers between users within the same counties, watersheds, or other areas of origin (i.e., intra-basin transfers). If enacted, the bill would provide that water transfers (or intra-basin water management actions) within counties, watersheds, or other areas of origin are deemed not to constitute an injury to any user of water with a point of diversion that is located outside the hydrologic area where the transfer takes place.
- AB 1741 is an attempt to deal with the chilling effect that the no injury rule has on intra-basin transfers.

Temporary Change (WC 1725) vs. Long-Term Change (WC 1700/1735)

- Guide seems to state that intra-basin water transfers would be subject to the requirement that only reductions in consumptive use may be transferred under the Temporary Change statutes. (Guide, at 6-12.)
- Limiting short-term petitions for intra-basin transfers to reduced consumptive use is contrary to area of origin protections if the transfer does not otherwise injure any legal users of water or unreasonably affect fish and wildlife.